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FOLLOW-UP TO THE WORLD CONFERENCE ON HUMAN RIGHTS

Written statement submitted by the International Committee for European Security and Cooperation, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[2 March 1995]

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BEYOND RESPONSIBILITY, CO-RESPONSIBILITY AND GUILT ON FORMER YUGOSLAVIA* **

1. The *International Law Commission* presented its *"Draft Statute for an International Criminal Court"* and its *"Draft Commentary"* (A/CN.4/L.491/Rev.2; A/CN.4/L.491/Rev.2/Add.1, 2 and 3). This coincided with numerous reports of alleged *"genocidal practices"*[1] in former Yugoslavia. An ill-prepared post-cold war Europe had allowed old patched-over wounds from the First and the Second World Wars to fester and break open again. It had witnessed in its midst grave violations of international humanitarian law for over three years. And the daily horrors brought into its living rooms through television were authoritatively confirmed and further detailed by the *Special Rapporteur* in his reports on the human rights situation in former Yugoslavia (E/CN.4/1995/57). Were the victims of these human aberrations thus about to *begin* to see *some* justice to be done? And no less important: were the root causes of the conflict properly addressed, giving the wounds a chance to be healed and the spiral of violence to be arrested?[2]

2. If the *responsibility* for these crimes was not limited to their *physical* perpetrators, did it extend to the *"Schreibtischtätern"* here and there, as was already admitted in the *Nuremberg trials?* Did it include those in power who, through their actions and inactions, unwittingly or not, seemed to have violated the *fundamental Corfu Pact* among the constituent peoples of former Yugoslavia (E/CN.4/1994/NGO/54)? For had they not opened up the *Pandora's box*, weakened the forces of reason, and strengthened the hands of those who had discovered *lies, deceit and atrocities* to be shortcuts to their objectives, entailing *no real risks for those eventually invited to the table?* Were they all free of at least *moral co-responsibility* for what happened and failed to happen in former Yugoslavia? Also: what about the States and their leaders and officials who, through their actions or omissions had materially contributed to the course of events and thus may have committed *internationally wrongful acts engaging the State's responsibility?* The still-to-be-investigated case of the *allegedly legal* UN arms embargo against *Bosnia-Herzegovina* shed some preliminary light on related questions which seemed to be worth pursuing beyond the following introductory observations.

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3. The *International Court of Justice*, in its *Order* of 13 September 1993, *inter alia*, observed that while *"all parties to the [1948 Genocide] Convention have thus undertaken 'to prevent and punish' the crime of genocide"*, the *Court* was *"not satisfied that all that might have been done has been done to prevent commission of the crime of genocide in the territory of Bosnia and Herzegovina"* since the *Court* gave its *Order* of 8 April 1993.

4. In his *Separate Opinion*, Judge *ad hoc* Elihu Lauterpacht raised the issue of *co-responsability for the commission of the crime of genocide*. He did so by pointing out the foreseeable and under no pretext excusable genocidal consequences of an *illegally, artificially and externally imposed weapons imbalance* which in effect denied an internationally recognized State the most fundamental of its rights, namely that of self-defense.

5. The British Foreign Office, in response to a letter to the Prime Minister on the matter, observed on 13 August 1993: *"Security Council Resolution 713 applied to the territory of what was then the State of Yugoslavia. In the view of the United Kingdom the Resolution continues to apply to the same geographical territory."* This novel approach to international law ignored that the UN deals only with States and not with geographical territories[3].

6. Echoing a corresponding *amicus curiae*[4] to the Court, Judge Lauterpacht indicated that Security Council resolution 713 (1991) concerned an arms embargo against *"Yugoslavia"*, that the Republic of Bosnia-Herzegovina was admitted to UN membership on 22 May 1992 without any reservation, that SCR 713 was never and, in as much as it would have been against *jus cogens*, could never *in law* have been extended to any of the new UN members who had formed part of former Yugoslavia, that *in law*, therefore, it could not be *"valid and binding in its operation against Bosnia-Herzegovina"*, and that those who operated its factual application, maintenance and enforcement had done no service to regional stability, humanity or the Rule of Law and, *in fact and in law*, might even have *made "Members of the United Nations accessories to genocide"*.

7. Did responsibility for an act involve only those ordering and committing it, as an Ambassador seemed to imply in the quote attributed to her by Anthony Lewis *("Yes to War Crimes Trials of the Beastly Commanders"*, International Herald Tribune, 28 June 1994)? Or did it extend to *"Those outsiders who connived it with the perpetrators of these crimes, the 'accomplices'."* as Salah Ezz quoted the former British Prime Minister Margaret Thatcher *("Abetting Bosnian Genocide"*, IHT, 5 July 1994)? What if the latter's contribution was perhaps less of a manifestly intentional or active, and more of an apparently "only" unwitting or passive nature, e.g. through *omission*?

8. Largely inspired by the picture of *Pontius Pilatus* washing his hands in the case the priests brought against *Jesus Christ*, i.e. innocenting himself through fence sitting and deliberate non-exercice of his powers, *Western thinking*, as expressed in the common man's related attitudes tended indeed towards the general *equation: inaction equals non-responsibility*. In contrast, *Eastern concepts* basically seemed to make no difference between action and inaction with regard to the *responsibilities* for the consequences entailed[5]. The French penal code's article on *"non-assistance to persons in danger"* appeared to be the exception which confirmed the rule.

9. The obligations under the *Genocide Convention* to which the *Hague Court* referred were not, of course, limited to the Government of the Federal Republic of Yugoslavia. The same held true for the Court's above-quoted critical comment. Indeed, after the Second World War, with *"never again"* on everybody's mind, it was natural that each signatory *unreservedly* committed his State *"to prevent and punish"* the crime of genocide.

10. A signatory State, *in apparent law*, could thus *fail* to take effective preventive action only as long as it did not *formally recognize the danger or existence of genocide*. Several permanent members of the Security Council, had indeed failed to do exactly that. This seemed to explain why the U.S. Ambassador had felt obliged to counter criticism by publicly seeking to limit the responsibility for what happened in Bosnia-Herzegovina to *"the people who ordered and committed the crimes."* And why the former Prime Minister felt compelled to show the flag of a higher-than-State morality and, by lending her voice to the *ordinary citizen's growing outrage*, to occupy the moral high ground.

11. Article 3 of the *International Law Commission's Draft Articles on State Responsibility*[6], stipulated:

> *"There is an internationally wrongful act of a State when:*
> *(a) Conduct consisting of an action or omission is attributable to the State under international law; and*
> *(b) That conduct constitutes a breach of an international obligation of the State."*

12. And while the *Draft Statute for an International Criminal Court* dealt with individual alleged crimes, it was of interest to note its Article 39 which stipulated that *"An accused shall not be held guilty: (a) in the case of a prosecution with respect to ... [e.g. genocide], unless the act or omission in question constituted a crime under international law"*. Also, e.g., the Swiss penal code explicitly provided for *non-prosecution* of crimes commited in the line of *professional or official duties*.

13. Passivity, inaction and omission to fulfil an international obligation were indeed "regular" political instruments, i.e. they formed part of the prevailing *"political culture"*. Article 3 of the above-quoted *Draft Articles on State Responsibility* was to eventually provide for clear co-responsibility of a State and its officials for an *internationally wrongful act* of that State in case of either action or omission being the material cause or contributor to a given *damage*. Yet, as ratification of these draft articles was not imminent, there was no apparent danger for those in power anywhere to be actually dragged into court for abetting genocide in *Croatia* and *Bosnia-Herzegovina* for their passivity, i.e. because of inaction or omission.

14. Their case would be different (in theory) if it could be shown, e.g., that some officials, be it on their own or at the behest of superior powers, were *scheming, misleading, rule-bending*, etc. in order to prevent the *Security Council* or the *General Assembly* from being properly informed, counseled and thus enabled to take appropriate action on whether or not the arms embargo on *"Yugoslavia"* was *legally* applicable to *Bosnia-Herzegovina*. It was understood that several such cases existed[7]. Yet, not least because the Bosnian ambassador to the UN in New York apparently had a *conflict of interest* for reasons of his double nationality, it would be difficult to deny that the thus *colluding victim* too became co-responsible for what happened - or failed to happen.

15. That and related cases thus risked never to be brought into the halls of justice, with only some visible wrong-doers eventually serving as scapegoats. Moreover, the audience here and there found itself rather abused, confused and *without any real moral or political leadership*. It was in desperate need for a ray of hope and constructive elements. And much more than partial justice, distracting *show trials* and pseudo vengence for past and actual human aberrations and failings were needed - if it was to find the path towards a *more enlightened, stable and worthwhile future*.

16. The above considerations, of course, were not intended to belittle the *individual* responsibility and guilt for the crimes that took place particularly in *Croatia* and *Bosnia-Herzegovina*. By putting into perspective those cases which might occupy the *International Criminal Court*, a voice is raised against the tendency to quickly forget all those cases which *escape human justice*. And *lessons* were sought to be learned from the actions, inactions and omissions of those *"Schreibtischtätern"* and leaders who failed to live up to their responsibilities - and thus may have done more individual and collective harm than all those eventually brought to justice combined.

17. Also, it was to remind all concerned, that they had a *future to build* and a *past to repair* and that they could not succede in either unless they faced the facts rationally, tolerantly and open-mindedly. That each participant of the conflict had to live with and, in one way or another, had to stand for all of his *actions and inactions*, whether he "served" on the *humanitarian* or the conceptual, virtual or real *killing, raping or torturing front*, in the dirty tricks department and/or in the corridors of power at the UN or elsewhere. And that irrespective of whether any one of those foreign and local "leaders" and "peacemakers" was ever to find himself in the docks for his hidden agenda and manifest co-responsibility for the desasters at hand, true salvation could only come from within, from working out solutions among all involved peoples themselves, and from *looking and working ahead - together with his fellow-men*.

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Notes

1. The *International Court of Justice*, by its *Order* of 8 April 1993 concerning the application of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 9 September 1948 in the case of *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, responded to the complaint about "genocidal practices", *inter alia*, by directing the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to *"take all measures within its power to prevent commission of the crime of genocide ... whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnic, racial or religious group"*.

2. To these effects, the *"Action Plan for ex-Yugoslavia"*, proposed to the parties to the conflict on 9 March 1993, may still be helpful, as may the recently developed *"Referendum Plan"* (see also: E/CN.4/Sub.2/1993/NGO/29, E/CN.4/1994/NGO/54).

3. If this were not the case, this ill-considered legal theory, if applied by analogy, would result, e.g., in the Eastern part of united Germany not to be covered by the NATO umbrella.

4. submitted by the *Good Offices Group of European Lawmakers* in line with its *mandate* of June 1991 (reproduced in: E/CN.4/Sub.2/1993/NGO/29) to contribute to a peaceful and lasting conflict resolution in all of former Yugoslavia.

5. The *market mechanism*, e.g., offered an illustration of this difference: although decisions to sell or not to sell, like decisions to buy or not to buy, affected the wealth of any decider anywhere fully and on an equal level. However, in comparison with their Eastern homologues, Western market players seemed to have more difficulty to recognize and adapt themselves to this fundamental market rule, and to give equal weight to one's market-related actions and inactions.

6. *Report of the International Law Commission (1973)*, A/9010/Rev.1, UN 1974, p.17.

7. As a result, the General Assembly resolution on Bosnia of December 1993 lacks all teeth; even the already integrated request to the *International Court of Justice* to provide an *Advisory Opinion* on the validity and applicability of the arms embargo to Bosnia-Herzegovina was thrown out at the last moment.